United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74 — 2257

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

HENRY JENKINS,

Appellant.

Docket No. 74-2257

B

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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ON APPEAL FROM A JUDGMENT
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FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the trial judge's refusal to instruct the jurors that they had to find as a fact that the crime was committed in the Southern District of New York is error mandating reversal.

2. The jury instruction on the credibility of witnesses was incorrect as a matter of law and necessarily resulted in an unconstitutional infringement on the presumption of innocence.

3. Whether the trial judge improperly restricted defense counsel's examination of the government witnesses.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lee P. Gagliardi) rendered September 11, 1974, after trial by jury, convicting appellant of six counts of possessing letters stolen from the mail (18 U.S.C. §1708). Appellant was sentenced to a six-month period of incarceration on each count, to run concurrently, and to be followed by a three-year period of probation.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged with sixteen counts of possession of letters stolen from the mail. Each count related to a separate check mailed from the New York City Department of Social Services.* At trial, conducted after a first trial ended in a hung jury, the Government's case against appellant consisted of a statement allegedly taken from him at the time of his arrest, and the testimony of the two inspectors of the United States

*The indictment is annexed as "B" to appellant's separate appendix.

Postal Service who obtained the statement.*

The statement,** taken on December 4, 1973, approximately eight months after the commission of the crime, set forth, in pertinent part:

> ... I have been shown several City of New York, Department of Social Services checks and have picked out those checks which were given to me by a person who works for the Post Office, and who I know as Big Man. The checks were given to me on or about April 16, 1974....
>
> * * *
>
> After receiving the checks from Big Man, knowing the same to have been stolen, I gave the subject checks to Vincent Cartilliga [sic], who operated a meat market located on Lenox Avenue, between 128th and 129th Streets....

Inspector Warren Monroe testified as to the facts surrounding the interrogation. Because appellant could not read, Monroe orally informed him of his Fifth Amendment rights (25-26***). According to Monroe, appellant identified certain checks and answered Monroe's questions (30-33). Then, because appellant did not know how to write -- he knew only how to sign his name

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*As evidence that the crime had been committed, there was also introduced into evidence a stipulation between the prosecutor and defense counsel in which it was agreed that if an employee of the Department of Social Services were to testify he would assert that the checks had been mailed in the ordinary course of business, and further, if the payees of the checks were to testify they would assert that they had never received the subject checks (114).

**The statement is annexed as "D" to appellant's separate appendix.

***Numerals in parentheses are references to pages in the trial transcript.

and write some numbers -- Monroe dictated the confession to a stenographer (36).

Although Monroe sought to present the statement as a joint effort between himself and appellant (36), on cross-examination Monroe conceded that the words of the statement were his and not appellant's* (79, 82). Thus, it was acknowledged that the portion of the statement relating to whether appellant understood and waived his rights is not appellant's statement, but a printed form (96). Moreover, Monroe admitted at trial that appellant never said he possessed the checks "on or about April 16, 1973," although the statement reflects such an admission** (66). Monroe also conceded that it was he and not appellant who supplied the name Vincent Catiglia for the statement (88). Similarly, the assertion in the "confession" of "knowing possession" was not appellant's, but Monroe's: it was the inspector's conclusion from the fact that appellant knew that "Big Man", a postal employee, was not the payee of the checks (66-68).

Significantly, although the Government sought to imply from Monroe's wording of the statement that appellant admitted giving Cartiglia the checks at the meat market on Lenox Avenue,

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*In fact, the stenographer was instructed to transcribe only what Monroe told her to (85-86).

**On re-direct, Monroe tried to explain that appellant had told him that he possessed the checks in the "spring" (107). However, on re-cross, it was revealed that in the first trial Monroe had testified that he had neither asked, nor had appellant volunteered, the point in time when he allegedly possessed the checks (110).

on re-direct, Monroe revealed that appellant had not indicated where he had uttered the checks and that the reference to the Lenox Avenue market was only for the purpose of identifying "Vinnie:"

> MONROE: I asked Mr. Jenkins when we were sitting there, he referred to Vincent Cartiglia as Vinnie. I said, "Who's Vinnie?" "He runs a meat market." I asked him, "Where is the meat market?" He told me where the meat market was.
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> (103).

Frank Gonzalez, a special investigator with the United States Postal Inspection Service, concurred that appellant had referred to the meat market only as a means of identifying Vinnie (120). Gonzalez also conceded that it was Cartiglia, arrested a week before appellant, who told the agents about appellant (125). Both Monroe and Gonzalez were subjected to extensive cross-examination as to the veracity of their assertions that appellant understood his rights, knowingly waived them, and participated in the authorship of the statement (65-104, 122-154). However, the judge repeatedly sustained the Government's objections to defense counsel's inquiries as to the availability of recording equipment at the time the statement was taken, as well as questions concerning the accuracy of the method of transcribing appellant's statement.

At the close of the Government's case the defense reserved motions (154), rested, and then moved for a judgment of acquittal, specifically on the grounds that the Government had failed to prove that the crime had been committed in the Southern Dis-

trict of New York (157-161). When the Court denied the motion, defense counsel requested that the judge instruct the jury on the issue of venue (161). When no such instruction* was given, defense counsel moved to amend the charge so as to include an instruction that the jury must find that the crime was committed in the Southern District of New York. The motion was denied (227).

On the issue of credibility of witnesses, the Court instructed the jury as follows:

> ... If you find that any witness has testified falsely, you can do one of two things: You can either reject all of that witness' testimony on the ground that it was all tainted by falsehood and that none of it is worthy of belief, or you can accept that part which you believe to be credible and reject only that part which you believe to be tainted by falsehood.
>
> Should you find that all or any part of a particular witness' testimony was false, you may not of course infer that the opposite of that testimony is the truth unless there is other evidence to that effect. Any testimony rejected by you as false is no longer in the case insofar as any finding that you may make is concerned.
>
> You will recall that I told you that an inference is a conclusion which reason or common sense leads you to draw from the facts which you find to have been proved. Thus a finding of fact may not be established merely by a negative inference arising from your disbelief and rejection of any testimony."
>
> (148).

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*The complete charge is annexed as "C" to appellant's separate appendix.

The jury deliberated the remainder of that day and the following morning, returning at intervals to ask five questions concerning appellant's ability to identify the checks (230, 231, 243, 244, 247). At 12:20 p.m., the jury returned its verdict finding appellant not guilty of counts 1, 2, 3, 7, 8, 9, 12, and 15, and guilty of counts 4, 5, 6, 10, 11, and 14.*

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*Counts 13 and 16 were not submitted to the jury because the payees of the checks would not have been available to testify as to non-receipt.

ARGUMENT

Point I

THE TRIAL JUDGE'S REFUSAL TO INSTRUCT THE JURORS THAT THEY HAD TO FIND AS A FACT THAT THE CRIME WAS COMMITTED IN THE SOUTHERN DISTRICT OF NEW YORK IS ERROR MANDATING REVERSAL.

At the trial there was no direct evidence to place the commission of the crime -- possession of the stolen mail -- in the Southern District of New York. Neither the written memorandum of appellant's purported statement nor the testimony of Inspectors Monroe and Gonzalez as to what appellant told them confront the issue of the *situs* of the crime.

While some of the evidence might be viewed as circumstantial indication that venue was proper, this evidence was far from conclusive and was sharply contested by the defense. For example, although at the time of his arrest appellant was working on Lenox Avenue, as was Vincent Cartiglia, according to the Government's own theory of the case, the crimes with which appellant was charged occurred approximately eight months earlier. The record is devoid of any indication that appellant or Vinnie worked on Lenox Avenue in April 1973, or indeed that the alleged transfer of the checks occurred where either was employed.*

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*In this connection it must also be noted that simple street addresses of the crime without the city and state locale have been held insufficient to establish venue. *Jones* v. *United States*, 174 F.2d 746 (7th Cir. 1949).

Any significance which might have been attributed to appellant's statement that "he gave the checks to Vincent Cartiglia, who operated a meat market located on Lenox Avenue" was negated when Inspector Monroe conceded that the statement was intended as an aid to identifying Cartiglia and not as an indication of where the crime occurred.

Moreover, although each of the checks is addressed to a payee who resides in the Bronx, there is absolutely no indication in the record of the address of the Department of Social Services office from which they were mailed. Again, according to the Government's theory of the case, if appellant got the checks from "Big Man" who worked in the Post Office, rather than from the mail boxes of the payees, it was possible for the jury to conclude that possession did not occur in either Manhattan or the Bronx. In fact, even if the jurors accepted in toto the testimony of the government witnesses, the absence of any direct testimony on the issue of situs would have required that they go beyond the testimony and decide whether to infer from that evidence that the crime occurred in the Southern District of New York.

Clearly, in this case resolution of the venue issue turned on a factual determination of the locus of the offense. Recently this Court reaffirmed that, without doubt, fixing the place where the crime was committed is a question of fact for the jury's determination. United States v. Jones, 480 F.2d 1135, 1138 (2d Cir. 1973).

Nonetheless, despite defense counsel's explicit request for a charge on venue,* his exception to the charge as given, and his motion for an amendment to the instruction so as to include a direction that the jury determine the situs of the crime, the trial judge refused to comply.

This Court has specifically held that failure to instruct the jury on venue is error. United States v. Gillette, 189 F.2d 449, 452 (2d Cir. 1951). See also United States v. Provoo, 215 F.2d 531, 537 (2d Cir. 1954). That venue is a question of fact for the jury is also acknowledged by other circuit courts of appeals. Green v. United States, 309 F.2d 852 (5th Cir. 1962); Weaver v. United States, 298 F.2d 496 (5th Cir. 1962); United States v. Lukark, 341 F.2d 325 (7th Cir.), cert. denied, 381 U.S. 938 (1965); Holeridge v. United States, 284 F.2d 302 (8th Cir. 1960); Dean v. United States, 246 F.2d 335 (8th Cir. 1957); Hill v. United States, 284 F.2d 754 (9th Cir. 1961).

The requirement that a case be tried in the proper place -- or venue -- rests on Constitutional guarantees. United States Constitution, Art. III, §2; Amendment Six; United States v. Johnson, 323 U.S. 273, 275 (1944); United States v. Rodriguez, 465 F.2d 5, 10 (2d Cir. 1972). Therefore, "[q]uestions

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*This request followed counsel's timely motion for a judgment of acquittal because the Government had failed to establish proper venue. United States v. Gross, 276 F.2d 816 (2d Cir.), cert. denied, 363 U.S. 831 (1960); United States v. Brothman, 131 F.2d 70 (2d Cir. 1951); Wright, FEDERAL PRACTICE & PROCEDURES (1969) §306.

of venue are more than matters of procedure" (Travers v. United States, 364 U.S. 631, 634 (1961)), and disputes as to venue raise "deep issues of public policy in light of which legislation must be construed." United States v. Johnson, supra, 323 U.S. at 276. Proof of venue is an indispensible part of the Government's case* (United States v. Johnson, ibid.; United States v. Budge, 350 F.2d 732 (7th Cir. 1966); United States v. Provoo, supra, 215 F.2d at 537; United States v. Gillette, supra, 189 F.2d at 452; United States v. Zeuli, 137 F.2d 845, 847 (2d Cir. 1943)), and failure to establish proper venue is fatal. United States v. Rodriguez, supra, 465 F.2d at 8.

Properly instructed on the issue of venue, the jurors, on the facts of this case, might well have concluded that although a crime was committed it was not committed in the Southern District of New York. The judge's refusal to charge as requested was error mandating reversal of the conviction.

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*Even those Circuits which depart from this rule and specify that venue need not be proved beyond a reasonable doubt still accept that venue is a question of fact for the jury. Hill v. United States, supra, 384 F.2d 745; Holeridge v. United States, supra, 282 F.2d at 302; Dean v. United States, supra, 246 F.2d at 335.

Point II

THE JURY INSTRUCTION ON THE CREDIBILITY OF WITNESSES WAS INCORRECT AS A MATTER OF LAW AND NECESSARILY RESULTED IN AN UNCONSTITUTIONAL INFRINGEMENT ON THE PRESUMPTION OF INNOCENCE.

A.

The only witnesses at trial were Inspectors Monroe and Gonzalez, both of whom testified for the Government. The intent of their testimony was to establish that appellant, fully understanding his rights, knowingly waived them, and in response to interrogation gave a complete confession of his guilt.

The defense theory was that appellant, illiterate and unintelligent, was virtually helpless against these agents, and that not only did he fail to understand his rights, he also did not participate, in any significant way, in his so-called confession. Rather, it was maintained that the statement was composed of a compendium of information which the inspectors had previously obtained from Vinnie Cartiglia. With persistence and determination on cross-examination, defense counsel succeeded in getting Monroe to admit that the statement was not a verbatim transcript of what appellant had said, but was, in reality, Monroe's version of the scheme which appellant did not contradict.

Counsel repeatedly questioned both Monroe and Gonzalez about the adequacy of the procedure used to inform appellant,

who could not read, of his Fifth Amendment rights. Monroe conceded that appellant did not specifically indicate an understanding of each of the rights, and he did not, despite the language of the statement, explicitly reject the assistance of a lawyer. Nevertheless, Monroe maintained that he adequately apprised appellant of his rights, and that appellant, understanding these rights, knowingly waived them. Both Monroe and Gonzalez also maintained that the written statement merely reflected the substance of what appellant freely told them.

Clearly, the credibility of these witnesses was pivotal to the outcome of the case. After instructing the jurors that an assessment of credibility was solely within their province, the judge went on, improperly, to infringe upon and restrict that assessment. Specifically, he charged:

> ... If you find that any witness has testified falsely, you can do one of two things: You can either reject all of that witness' testimony on the ground that it was all tainted by falsehood and that none of it is worthy of be lief, or you can accept that part which you believe to be credible and reject only that part which you believe to be tainted by falsehood.
>
> Should you find that all or any part of a particular witness' testimony was false, you may not of course infer that the opposite of that testimony is the truth unless there is other evidence to that effect. Any testimony rejected by you as false is no longer in the case insofar as any finding that you may make is concerned.
>
> You will recall that I told you that an inference is a conclusion which reason or common sense leads you to draw from the facts

> which you find to have been proved. Thus a finding of fact may not be established merely by a negative inference arising from your disbelief and rejection of any testimony."
>
> (148).

This was error. In Dyer v. MacDougall, 201 F.2d 265 (2d Cir. 1952) (Hand, J.), this Circuit explicitly rejected the theory that the trier of fact can be precluded from inferring, if it disbelieves a witness, the opposite of what the witness says:

> ... [Jurors] may, and indeed they should, take into consideration the whole nexus of sense impressions they get from a witness.... Moreover, such evidence may satisfy the tribunal, not only that the witness's testimony is not true, but that the truth is the one opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."
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> Id., at 269.*

The logic of this analysis has with frequency and regularity been applied by this Court and other circuit courts of appeals. United States v. Castro, 476 F.2d 750, 753 (9th Cir. 1973); United States v. Scher, 476 F.2d 319, 321-322 (7th Cir. 1973); United States v. Weinstein, 452 F.2d 704, 714 (2d Cir. 1971); United States v. Cisneros, 448 F.2d 298, 305 (9th Cir.

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*Inapplicable here, of course, is the caveat expressed in Dyer, that the party who has the burden of proof cannot rely on the negative inference alone. See Hishikawa v. Dulles, 356 U.S. 129, 137 (1958). Not only did appellant have no burden of proof, he also had the presumption of innocence to sustain a verdict in his favor.

1971); United States v. Tropiano, 418 F.2d 1071, 1075 (2d Cir. 1969); United States v. Arcuri, 405 F.2d 691 (2d Cir. 1968); Ege v. United States, 242 U.S. 879 (9th Cir. 1957); Bennett v. United States, 234 F.2d 675 (9th Cir. 1956).

In United States v. Tropiano, supra, 418 F.2d at 1075, this Court found sufficient evidence to affirm a conviction because it concluded that the jury was free to disbelieve the defendant's witnesses and conclude facts opposite to what they had testified. This rule is especially compelling where, as here, the substance of the testimony admits to one of only two possible alternatives -- for example, the assertion that Miranda rights were given, the assertion that appellant said he understood those rights, or the assertion that appellant knew the checks were stolen when he possessed them -- rejection of the testimony leads appropriately to the inference that the reverse is true.

In this case, if the jury disbelieved Monroe and Gonzalez,* appellant was entitled to have the jury infer, if it chose to do so, the opposite of what the inspectors asserted. The freedom to so conclude was particularly critical here. The voluntariness and/or the weight and sufficiency to be attributed to appellant's written statement turned on the jurors' assessment

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*The guilty verdict does not preclude this hypothesis because, on this instruction, conviction may have been based on appellant's alleged confession alone. Further, the fact that the jurors had trouble with the case is reflected in their acquittal on half of the counts charged in the indictment.

of the inspectors' credibility. Because of this erroneous instruction, the jurors were obliged, if they discredited the witnesses, to regard the witnesses' testimony as though it "is no longer in the case." On this record, that meant that the jurors were precluded from finding that appellant did not make the confession, and the confession thus remained improperly untainted and unimpeached.

B.

Not only was the charge incorrect as a matter of law, in the context of this case, where only government witnesses testified, its use resulted in an unconstitutional violation of the presumption of innocence.

> ... The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.
>
> Coffin v. United States, 156 U.S. 432, 433 (1895);

Morrisette v. United States, 342 U.S. 275-276 (1952); In re Winship, 397 U.S. 358, 363 (1970).

In essence, the testimony of both Monroe and Gonzalez, if accepted, established appellant's possession of the checks, his knowledge that they were stolen, and thus his guilt. Therefore, if the jury discredited their testimony, the presumption of innocence entitled appellant to have the jury believe the opposite of what these witnesses asserted. However, this is

exactly what the judge's instruction, in error, told them not to do.

That the judge correctly charged the jury that the Government had the burden of proving guilt beyond a reasonable doubt does not overcome the fact that the instruction below contravenes the presumption of innocence.* The "presumption of innocence" and "proof beyond a reasonable doubt" are two entirely distinct concepts: the presumption of innocence is evidence in favor of the accused, while the reasonable doubt requirement is the collective state of mind of the jury produced by the evidence or lack thereof. Coffin v. United States, supra, 156 U.S. at 460. In this case, upon rejection of the witnesses' credibility, the presumption of innocence entitled appellant to have the jury consider the opposite of what the witnesses said in assessing whether the Government had met its burden of proof beyond a reasonable doubt. As the Supreme Court held, in Coffin v. United States, supra, to allow otherwise is error because it is tantamount to saying:

> ... that legal evidence [the presumption of innocence] can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of an important

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*Nor did the general direction as to the presumption of innocence given earlier in the charge compensate for this error. United States v. Clark, 475 F.2d 240, 249-250 (2d Cir. 1973). The erroneous instruction given as a concrete rule in evaluating witness credibility necessarily had greater impact on the jury than did the general caveat of the presumption.

element of proof can be justified by correctly instructing as to the proof admitted.

Id., at 460.

In this case, assessing properly whether the evidence established guilt beyond a reasonable doubt required permitting the jury the proper latitude to infer the opposite of what Monroe and Gonzalez asserted. Precluding the jury from doing so was fundamental error mandating reversal even absent objection. United States v. Clark, supra, 475 F.2d at 250; United States v. Fields, 466 F.2d 119 (2d Cir. 1972); Rule 52 (b), Fed.R.Crim.Proc.

Point III

THE TRIAL JUDGE IMPROPERLY RESTRICTED DEFENSE COUNSEL'S EXAMINATION OF THE GOVERNMENT WITNESSES.

Inspector Monroe conceded that the so-called confession which was introduced into evidence was not a verbatim account of what appellant had told him. He admitted the words were his and not appellant's, and counsel in cross-examination ascertained that parts of the statements were indeed not made by appellant.

In an attempt further to support this contention that the confession was not appellant's, defense counsel sought to explore why Monroe had chosen to dictate his own words to a stenographer rather than attempt to get a verbatim account from appellant.

Each time counsel sought to inquire as to the availability of recording equipment or the reason why a "question and answer type" of interrogation was not conducted, the court sustained the Government's objections.* This was error.**

Counsel should have been permitted to elicit evidence***

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*At the first trial, which ended in a hung jury, this type of examination was permitted. Copies of those portions of the transcript of the first trial will be provided to this Court upon request.

**Defense counsel objected to the court's curtailment of his cross-examination (72-74).

***At the first trial, Monroe conceded the availability of the recording equipment.

from which he could properly and effectively argue that Monroe's failure to obtain a verbatim record of appellant's alleged confession indicated that, contrary to Monroe's assertion, appellant had not admitted to him all the essential elements of the crime.

Since the confession was the only evidence against appellant, the defense was precluded from presenting an adequate answer. This was prejudicial and, in this case, an error requiring reversal.

CONCLUSION

For the above-stated reasons, the judgment of conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

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